

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
Time Warner Entertainment Company, L.P.	)	
	)	
Time Warner Cable of Southeast Wisconsin, L.P.	)	
	)	CSR-5924-E
Century Venture Corporation	)	
	)	
Petition for Determination of Effective	)	
Competition in City of Brookfield, the Town of	)	
Brookfield, the City of Cedarburg, and Certain	)	
Other Wisconsin Communities	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: June 27, 2003**

**Released: July 2, 2003**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. Time Warner Entertainment Company, L.P., Time Warner Cable of Southeast Wisconsin, L.P., and Century Venture Corporation d/b/a/ Time Warner Cable (collectively "Time Warner") have filed with the Commission a petition pursuant to Section 76.7 of the Commission's rules for a determination of effective competition in eight Wisconsin communities (the "Communities").<sup>1</sup> Time Warner alleges that its cable systems serving the Communities are subject to effective competition pursuant to Section 623(a) of the Communications Act of 1934, as amended ("Communications Act"), and Section 76.905(b)(2) of the Commission's rules, and seeks revocation of the City of Brookfield and the City of Mequon to regulate basic cable service rates.<sup>2</sup> Time Warner claims the presence of effective competition in the Communities stems from the competing services provided by two direct broadcast satellite ("DBS") providers, DIRECTV, Inc. ("DIRECTV") and DISH Network ("DISH"). The City of Brookfield (the "City") and the Regional Telecommunications Commission filed oppositions to the petition and Time Warner filed a reply to the City of Brookfield's opposition.<sup>3</sup>

**II. DISCUSSION**

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be

<sup>1</sup> 47 C.F.R. § 76.7. The Communities are listed on Attachment A.

<sup>2</sup> 47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(2).

<sup>3</sup> Three of the Regional Telecommunications Commission's members, the City of Brookfield, the City of Mequon and the Village of Thiensville, are parties to this proceeding.

subject to effective competition,<sup>4</sup> as that term is defined by Section 76.905 of the Commission's rules.<sup>5</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. Based on the record in this proceeding, Time Warner has met this burden.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds fifteen percent of the households in the franchise area.<sup>6</sup>

4. Turning to the first prong of the competing provider test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.<sup>7</sup> Time Warner has provided evidence of the advertising of DBS service in news media serving the Communities.<sup>8</sup> We find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer more than 12 channels of video programming, including more than one non-broadcast channel.<sup>9</sup> Time Warner has demonstrated that the Communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise areas. Time Warner has also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the Communities, that there exists no regulatory, technical, or other impediments to households within the Communities taking the services of the DBS providers, and that potential subscribers in the Communities have been made reasonably aware of the MVPD services of DIRECTV and DISH.<sup>10</sup> Therefore, the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Time Warner sought to determine the competing provider penetration in its franchise areas by purchasing a report from SkyTrends that identified the number of subscribers attributable to the DBS providers within the Communities on a five-digit zip code basis.<sup>11</sup> Time Warner has used a formula that compares U.S. Census household data for the Communities and the relevant zip codes in order to derive an allocation to apply against the DBS subscriber count.<sup>12</sup> Time Warner also reduces the estimated DBS

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<sup>4</sup> 47 C.F.R. § 76.906.

<sup>5</sup> 47 C.F.R. § 76.905.

<sup>6</sup> 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>7</sup> *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

<sup>8</sup> Petition at 4 and Exhibit A.

<sup>9</sup> *See* 47 C.F.R. § 76.905(g). *See also* Petition at 5 and Exhibits B, C, and D. Exhibit B contains the nationwide channel lineup of DISH and Exhibit C contains DIRECTV's channel lineup. Exhibit D includes the channel lineups for Time Warner's cable systems serving the Communities.

<sup>10</sup> Petition at 3-4.

<sup>11</sup> *Id.* at 7 and Exhibit G.

<sup>12</sup> *Id.* at 7 and Exhibits F, G, H; *see also Charter Communications Properties, LLC*, 17 FCC Rcd 4617, 4619 (continued...)

subscriber count by 10 percent to reflect the possibility that some households have subscribed to both cable and DBS service and to take into account commercial or test accounts.<sup>13</sup> Time Warner asserts that it is the largest MVPD in the Communities because Time Warner's subscribership exceeds the aggregate DBS subscribership for each franchise area.<sup>14</sup>

6. The City of Brookfield and the Regional Telecommunications Commission dispute the validity and accuracy of the data submitted by Time Warner in order to satisfy the second prong of the competing provider test. The Regional Telecommunications Commission argues that the methodology used by Time Warner in determining its statistics is questionable because zip codes spread over different communities and Time Warner needs to conduct a house-by-house survey in order to substantiate its claim.<sup>15</sup> The City of Brookfield argues that Time Warner has not met its burden of demonstrating that the number of households subscribing to DBS exceeds 15 percent of the households in the franchise area.<sup>16</sup>

7. The City of Brookfield disputes that DBS providers have achieved a precise 15.94 percent penetration rate within the City because many DBS subscribers that Time Warner attributes to the City likely reside outside the City limits and yet are still included in the SkyTrends data.<sup>17</sup> The City argues that Time Warner's methodology is flawed because there is no way to determine, with any reasonable degree of accuracy, the actual number of households within the franchise that subscribe to DBS.<sup>18</sup> The City asserts that many DBS subscribers likely reside in Menomonee Falls located adjacent to

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(2002). Time Warner also asserts that its allocation method is reasonable considering that Wisconsin's state-wide penetration rate is 24.24 percent. Petition at Exhibit I (SkyTrends report on DBS subscribers by State). Thus, Time Warner contends that a detailed analysis of zip code areas that may fall outside the franchise boundary is unnecessary. Time Warner states that it is now accepted that DBS subscribers no longer reside predominantly in rural areas. Petition at n.28.

<sup>13</sup> Petition at 8. According to documentation previously provided to the Commission, SkyTrend's zip code subscriber numbers are inflated by roughly ten percent "due to dual receivers, and limited commercial and test accounts." See *Charter Communications*, 17 FCC Rcd 15491, 15493 n.13 (2002). Since then, SkyTrends has revised its inflation estimate from ten to fifteen percent. However, when Time Warner filed its petition, the ten percent figure used was the standard percentage and we find its use acceptable in this case.

<sup>14</sup> Petition at 6-7 and Exhibits E and H. Time Warner compares Exhibit E, Time Warner Subscribership Summary and Exhibit H, Column F, "DTH Subs Allocated to Franchise Area." Although Time Warner states that it is the largest MVPD in each of the Communities, it is not possible to ascertain whether this is true for the City of Mequon because the aggregate DBS subscribership figure is larger than the number of Time Warner subscribers for that franchise area. We are, nevertheless, able to determine that Time Warner is subject to effective competition in Mequon. Assuming that one of the DBS providers is the largest MVPD in that franchise area, Time Warner's Mequon subscribership by itself exceeds the 15 percent threshold of the second prong of the competing provider test (1,454 Time Warner Mequon subscribers ÷ 7,861 Mequon Census 2000 households = 18.50%).

<sup>15</sup> The Regional Telecommunications Commission makes other arguments in its opposition that are not directly related to this proceeding. Such arguments include Time Warner's alleged refusal to allow access to its high speed internet network to other internet system providers and the refusal to allow use of non-Time Warner converter boxes. This is not the proper forum to address these issues. This proceeding is narrowing tailored to address Time Warner's assertion that it is subject to effective competition because it meets the criteria set forth in the competing provider test.

<sup>16</sup> The City of Brookfield Opposition at 2.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* The City takes issue with the allocation figure of 53% that Time Warner derives when it divides the total  
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and north of the City.<sup>19</sup> According to the City, residential housing in Menomonee Falls is spread out and the penetration of DBS in Menomonee Falls is likely far higher than in the City.<sup>20</sup> The City argues that SkyTrends data is not precise enough to verify that DBS subscribers reside in the City as opposed to other adjacent communities.<sup>21</sup> The City claims that DBS penetration would be considerably greater outside the City limits where residents, such as those in Menomonee Falls, may not have the opportunity to subscribe to cable because Time Warner may not have extended service to that area.<sup>22</sup> The City argues that because Time Warner relies on a calculated percentage of 15.94 percent, less than 1 percent above the minimum threshold, it is easily possible, if not probable, that DBS penetration in the City of Brookfield falls below 15 percent.<sup>23</sup>

8. In reply, Time Warner asserts that it relied upon a Commission-approved methodology for calculating DBS penetration on a franchise-by-franchise basis using zip codes and information supplied by SkyTrends.<sup>24</sup> Using this methodology, Time Warner asserts that it simply exercised its statutory right to seek a determination of effective competition pursuant to the competing provider test.<sup>25</sup> Time Warner further asserts that when using DBS penetration as the basis for a showing under the competing provider test, there is no other solution but to rely on zip code penetration figures from SkyTrends.<sup>26</sup> Time Warner argues that the Commission is aware that DBS providers will only divulge penetration figures through the SkyTrends clearinghouse and only on a zipcode-by-zipcode basis.<sup>27</sup> Moreover, Time Warner asserts that because the competing provider test requires a franchise area analysis and because the boundaries of most franchise areas do not match up perfectly with zip codes, some methodology must be used to extrapolate the available zip code figures into useful franchise area figures.<sup>28</sup> Time Warner asserts that this current subscriber penetration methodology must be accepted unless the City can present and defend an alternative, more accurate methodology.<sup>29</sup>

9. Time Warner also addresses the City's more specific point that higher DBS penetration in the adjacent community of Menomonee Falls likely inflates the City's penetration figure. According to Time Warner, the City of Brookfield and Menomonee Falls do not share the same zip codes.<sup>30</sup> Time

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Census 2000 Brookfield households (13,891) by the total five-digit zip code households in the City - 26,437 - (from SkyTrends) by using a previously-approved five-digit allocation methodology. *See* Petition at Exhibit H. The City argues that this methodology is flawed because it does not accurately determine the number of households within a franchise area that subscribe to DBS.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 4.

<sup>24</sup> Time Warner Reply at 2; *see e.g. Charter Communications Properties, LLC*, 17 FCC Rcd 4617, 4618 (2002).

<sup>25</sup> Time Warner Reply at 2.

<sup>26</sup> *Id.* at 3.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 4.

<sup>30</sup> *Id.* and Exhibit 1. Time Warner states Menomonee Falls's zip codes are 53051 and 53052. Time Warner asserts  
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Warner asserts that none of the four zip codes for the City of Brookfield overlap Menomonee Falls.<sup>31</sup> Accordingly, Time Warner contends that because the two towns do not share any of the same zip codes, there is no possibility for higher penetration figures in one community to skew penetration figures in another.<sup>32</sup>

10. We agree with Time Warner that the Commission has consistently accepted SkyTrends data as reliable for purposes of effective competition determinations.<sup>33</sup> Time Warner has demonstrated that the five digit zip code subscriber data it received from SkyTrends is specific to the eight Wisconsin Communities. The City of Brookfield and the Regional Telecommunications Commission have presented no evidence to call into question the validity of the SkyTrends report. Neither the City nor the Regional Telecommunications Commission has offered a different or a more accurate method to make this determination and, absent such a submission by the parties, we affirm that the SkyTrends data submitted by Time Warner is the best available source for determining DBS penetration in these cases. Accordingly, we accept as reliable the number of DBS subscribers in the Communities as indicated in Time Warner's petition.

11. Based upon the aggregate DIRECTV and DISH subscriber penetration levels as reflected in Attachment A, calculated using 2000 Census household data, we find that Time Warner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in each of the Communities. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Time Warner has submitted sufficient evidence demonstrating that its cable systems serving the Communities are subject to effective competition.

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that these two zip codes do not cover any of Brookfield and, therefore, were not included in Time Warner's DBS penetration analysis for Brookfield. *Id.*

<sup>31</sup> *Id.* and Exhibit 1.

<sup>32</sup> *Id.* Time Warner also argues that even if Menomonee Falls shared zip codes with the City, Menomonee Falls does not have significantly higher DBS penetration figures that would explain an artificial inflation of the City's penetration figures. *Id.* Time Warner states that, according to SkyTrends, Menomonee Fall's zip code 53051 has 13,535 households and 2,363 DBS subscribers and zip code 53052 has 238 households and 3 DBS subscribers, totaling 13,773 households and 2,366 DBS subscribers. Using the five-digit zip code allocation formula, Time Warner asserts that Menomonee Falls has a slightly lower DBS penetration than Brookfield (15.46% vs. 15.94%). *Id.* and Exhibit 2.

<sup>33</sup> See *Charter Communications Properties, LLC*, 17 FCC Rcd 4617 (2002).

**III. ORDERING CLAUSES**

12. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed by Time Warner Entertainment Company, L.P., Time Warner Cable of Southeast Wisconsin, L.P., and Century Venture Corporation **IS GRANTED**.

13. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service in the City of Brookfield and the City of Mequon, Wisconsin **ARE REVOKED**.

14. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.<sup>34</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Deputy Chief, Policy Division, Media Bureau

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<sup>34</sup> 47 C.F.R. § 0.283.

## ATTACHMENT A

## CSR-5924-E

COMMUNITIES SERVED BY  
TIME WARNER

Communities	CUIDS	CPR*	2000 Census Households+	Estimated DBS <sup>‡</sup> Subscribers+	Time Warner Subscribers+
Brookfield, City of	WI0453	15.95	13,891	2215	9208
Brookfield, Town of	WI0343	16.29	2,762	450	1454
Cedarburg, City of	WI0264	16.52	4,432	732	2726
Cedarburg, Town of	WI0698	16.51	1,896	313	1105
Mequon, City of	WI0540	19.96	7,861	1568	1454
Plymouth, City of	WI0435	24.99	3,262	815	2415
Plymouth, Town of	WI0430	25.00	1,092	273	546
Thiensville, Village	WI0354	19.16	1,503	288	872

\*CPR = Percent of competitive DBS penetration rate.

<sup>+</sup>See Petition at Exhibits E, F, H.

<sup>‡</sup>DBS subscriber estimate includes 10% reduction.